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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 251

ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased,

*Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

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ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased,

Petitioner,

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Ethel Anderson, as Administratrix of the Estate of James Lester Anderson, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered and entered in this case on May 21, 1959.

### The Opinion Below.

The opinion of the Court of Appeals has not been reported at the date of this petition. A copy of the opinion (R. 726) is appended beginning at page 11.

The District Judge wrote a memorandum (R. 711) which is set out in the appendix, *post*, page 18.

## Jurisdiction.

Jurisdiction to issue the writ rests on 28 U. S. Code, §1254(1). This petition presents a claim of right under the Federal Employers' Liability Act, 45 U. S. Code §51.

The judgment of the Court of Appeals was entered on May 21, 1959 (R. 736; it is set out at page 18, *post*). A petition for rehearing, timely filed June 8, 1959 (R. 738) was denied without opinion June 17, 1959 (R. 753).

## Question Presented.

Whether a judgment recovered by an injured railroad employee for injuries inflicted by the running of a train should be reversed for the sole reason that the District Judge charged the jury respecting the doctrine of the last clear chance that implied or imputed knowledge, as well as actual knowledge, by defendant of plaintiff's peril would set the doctrine in motion.

## Statute Involved.

The statutory provisions involved are sections 51, 53, 54 and 56 of the Federal Employers' Liability Act, *ib.* 45 U. S. Code; 53 Stat. 1404, 35 Stat. 66, and 62 Stat. 989, respectively.

## Statement of the Case.

James Lester Anderson, a citizen of Florida, 25 years old, in good physical and mental health (R. 165), employed and engaged by the respondent railroad as a flagman, was so grievously injured when struck by an Atlantic Coast Line

train that forty-two months afterward and during this litigation he died, and for him as a party his administratrix was substituted.

Anderson brought this suit in the District Court for the Southern District of Florida under 45 U. S. Code, Sec. 56.

A jury in the District Court gave Anderson a verdict for $115,000. The District Judge refused to interfere with it (R. 710).

The Court of Appeals held that the case was properly one for the jury. It did not interfere with the amount of the verdict nor criticize the amount. The Court of Appeals reversed the judgment on the ground that the last clear chance doctrine does not come into play unless there is actual discovery by defendant of plaintiff's peril; and, said that (R. 734):

> "It is not enough that the peril might have been discovered by the exercise of reasonable care. The instruction given was erroneous and because of the error we reverse for a new trial".

(This Court rebuked that method of depriving an injured railroad employee of the fruits of a jury verdict in *Affolder* v. *New York C. & St. L. R. Co.*, 339 U. S. 96, 94 L. Ed. 683.) The Court of Appeals said it held as it did because of *St. Louis SW. Ry Co.* v. *Simpson*, 286 U. S. 346, 76 L. Ed. 1152, decided in 1932, which in turn was based on *Woloszynowski* v. *New York Central R. R. Co.*, 254 N. Y. 206, 172 NE 471, decided in 1930 (R. 733). The Court of Appeals consciously refused to follow the conceded weight of authority (R. 732) though every pertinent pronouncement by this Court teaches that every permissible principle should be applied liberally for the benefit of the employee.

## The Facts of the Injury.

In the early morning when the weather was clear with night, Anderson had been taken by automobile by respondent's trainmaster to a spot where Anderson was to flag the northbound train that later struck and injured him. The trainmaster had instructed him to place torpedoes on the track, walk north to a point 1500 to 2000 feet down the track and there flag the train. The torpedoes were placed and Anderson went on to that point. He had earlier that night flagged on that same track in the same general area a southbound train, without incident (R. 167). On that occasion another employee of respondent's, with weather conditions substantially the same (R. 469) and the train running about 35 or 40 miles per hour, had seen Anderson's shadow a quarter of a mile away, "right in the middle of the rails"; and on that occasion, within that distance, the engineer stopped in order that Anderson might get aboard (R. 469-471), which he did.

Not only did Anderson place the torpedoes as directed by the trainmaster; he also put down a burning fusee. When the train passed over the torpedoes their explosion was heard nearly a mile away (R. 134), from a point about half a mile north of the spot where Anderson's body was found (R. 138). When they were heard, defendant's trainmaster, located about half a mile north of the point where Anderson's body was found, saw a "red glow", which he took to be Anderson's fusee (R. 144/45). "A flare of red light" was seen a few minutes before the blowing of the train whistle was heard for a long time a long way off (R. 76). The light was recognized as "a fusee on the railroad where they put it on the railroad for the train . . . burning out there" (R. 106). Such a fusee at such a loca-

tion is visible for at least six miles (R. 172). It burns for ten minutes (R. 146). Three or four minutes afterwards the train was heard coming, blowing (R. 107). The railroad's Rule 11 forbade a burning fusee on or near the track of an approaching train to be passed until it had burned out (R. 291). And the railroad's Rule 15 (R. 291) and the Company's operating practice commanded the engineer, when he passed the torpedoes, "to reduce speed and look out for a flagman, or an obstruction ahead" (R. 156). As a matter of fact both engineer and fireman "were looking to be flagged" (R. 52) when the torpedoes exploded. The jury would have been entitled to find that the engineer did not comply with either of those rules. He, dead at the time of the trial, stated to an investigating officer the night of the accident that he had seen Anderson's flares and that north of the flares he had seen a man in the train's light (R. 263).

Anderson was seen by the fireman when the locomotive was within 150-200 feet of him—sitting on the east rail facing west (towards the center of the track) with his arms folded on his knees and his head laying on his arms (R. 38). The locomotive's headlight, burning, enabled the fireman to see "down the track". . . "approximately a quarter of a mile to a half" (R. 34). The track at that point was straight and level for more than twenty miles (R. 29). No whistle was blown nearer than half a mile south of where Anderson was sitting (R. 39), where it was blown for a grade crossing at a time when the speed of the train was about 40 miles per hour (R. 37). The speed was reduced only five miles an hour before Anderson was struck (R. 37) after the emergency brake had been unavailingly applied by the engineer upon the fireman's telling him of Anderson's presence on the track.

The Court of Appeals did not envision the possibility that if the engineer had blown the whistle as soon as the fireman spoke, Anderson, unless he had been stricken helpless with a mortal seizure, could have escaped injury simply by falling or rolling off the track; but decided the case on the narrow concept that "Anderson was not discovered until too late to avoid hitting him" (R. 733).

## Reasons for Granting the Writ.

1. The opinion of the Court of Appeals has eroded the proper administration of the Act by a narrow and niggardly construction which this Court disapproved in *Rogers* v. *Mo. P. R. Co.*, 352 U. S. 500, 509, 77 S. Ct. 443, 1 L. Ed. 2d 493, 501. In doing so, the Court of Appeals has decided a Federal question of substance in a way probably not in accord with, indeed in conflict with, applicable decisions of this Court.

2. The petitioner here asserts Federal rights governed by Federal law as to which this Court said, in *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360, 361, 77 S. Ct. 1375, 1 L. Ed. 2d 889, 891, the Court will see to it that such rights are fully protected as the Congress intended them to be.

3. Unless the writ be granted, this Court's mandate holding railroads to strict accountability under the Federal Employers' Liability Act will not be honored. *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901, 902, 77 S. Ct. 1093, 1 L. Ed. 2d 1268, 1270, separate opinion. The Court of Appeals has established a new rule of law and one which, under the uniform flow of decisions by this Court involving the Federal Employers' Liability Act, should not be countenanced.

4. The opinion of the Court of Appeals reaches its result by over-exacting requirements for meticulosity, such as this Court brushed aside in *Brown* v. *Western Ry. of Ala.*, 338 U. S. 294, 299, 94 L. Ed. 100, 104.

5. In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497; in *Owens* v. *Union P. R. Co.*, 319 U. S. 715, 87 L. Ed. 1683; and in *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 93 L. Ed. 208, the rights of those employees to recover were not denied nor even clouded by the consideration that each of them had the last clear chance to avoid his injury.

6. To the extent that the Court of Appeals' views about the last clear chance are relevant or pertinent, it is apparent that the Court did not consider

(1) That the doctrine is an extension of the principle of proximate cause and that the operation of that principle relegates a plaintiff's contributory negligence to the status of a remote and not efficient cause. The view of the Court of Appeals is not consistent with this Court's holdings in *Fairport P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 598, 78 L. Ed. 1446; and *Kansas City So. Ry. Co.* v. *Ellzey*, 275 U. S. 236, 240, 72 L. Ed. 259, where the Court said that defendant's excusable unawareness of plaintiff's peril can not arise from carelessness;

(2) That last clear chance is a facet of negligence; and that the holding that only actual knowledge can activate the doctrine is not in accord with the view this Court expressed in *Urie* v. *Thompson*, 337 U. S. 163, 178, 93 L. Ed. 1282, 1297, that a railroad's negligence

> "... within the meaning of the Federal Employers Liability Act, attaches if respondent 'knew, *or by the exercise of due care should have known*' that preva-

lent standards of conduct were inadequate to protect petitioner . . . respondent's knowledge, actual or constructive . . . was a jury question". (Emphasis supplied.)

7. The opinion of the Court of Appeals gives the last clear chance doctrine one significance in general tort law and another and a stricter and narrower concept under the Federal Employers' Liability Act. (In *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 431, 78 S. Ct. 494, 2 L. Ed. 2d 382, this Court disapproved the decision of Jones Act cases "upon their [the District and Circuit Courts'] views of general tort doctrine".) We do not find other authority for such a distinction. This Court, other courts of appeal, and the Fifth Circuit Court of Appeals, applying the doctrine generally, give implied or imputed knowledge the same efficacy as actual knowledge of a defendant's dangerous plight. *Kansas City So. Ry. Co.* v. *Ellzey*, *supra* (275 U. S. 236, 240, 72 L. Ed. 259); *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 428, 36 L. Ed. 487, 492.

Some of such holdings by other Circuit Courts are: *Evansville Container Corp.* v. *McDonald*, 6 Cir., 1942, 132 F. 2d 80, 85; *Cobb* v. *Capital Transit Co.*, U. S. App., D. C., 1945, 148 F. 2d 217; *Nielsen* v. *Richman*, 8 Cir., 1940, 114 F. 2d 613; *Theurer* v. *Holland Furnace Co.*, 10 Cir., 1941, 124 F. 2d 494; *Weller* v. *Henry*, 4 Cir., 1950, 181 F. 2d 10; *Churchill* v. *Southern Pac. Co.*, 9 Cir., 1954, 215 F. 2d 657; *Duff* v. *United States*, 4 Cir., 1949, 171 F. 2d 846; *Stinson* v. *Aluminum Co. of America*, 6 Cir., 1944, 141 F. 2d 682; *Friedman* v. *Morris*, 4 Cir., 1954, 209 F. 2d 886; *Schweitzer* v. *Gilmore*, 2 Cir., 1958, 251 F. 2d 171; *Linde Air Products Co.* v. *Cameron*, 4 Cir., 1936, 82 F. 2d 22; *Puerto Rico Ry. Light & Power Co.* v. *Miranda*, 1 Cir., 1932, 62 F. 2d 479.

Some of such cases from the Fifth Circuit are: *Lapuyade* v. *Pacific Employers Ins. Co.*, 5 Cir., 1953, 202 F. 2d 494; *Consumers L. & V. Co.* v. *Atlantic C. L. R. Co.*, 5 Cir., 1941, 117 F. 2d 329, 330; *Allen* v. *Texas & Pac. Ry. Co.*, 5 Cir., 1952, 195 F. 2d 545.

## Conclusion.

For the foregoing reasons the case is submitted to this Court as one calling for its supervisory jurisdiction in an important field of Federal law, and as justifying the grant of certiorari we pray for.

Respectfully submitted,

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## Certificate of Service.

I hereby certify that I served this document this 27th day of July, 1959, by depositing a copy of it in a United States mail box with first class postage prepaid, addressed to Kurz & Toole, Esquires, counsel of record, at their post office address.

WILLIAM M. HOWELL,
Of Counsel and Attorney for Appellee.

## Opinion of Court of Appeals.

May 21, 1959

(R. 726)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant railroad operated through Chiefland, Florida, where its line of rail lies in a north-south direction. James Lester Anderson was employed by the railroad as a flagman. On the early morning of June 15, 1955, the railroad's train designated as Work Extra No. 225, was engaged in switching cars loaded with watermelons at Chiefland. Anderson was assigned to this train. In the protection of the work train he was directed to flag down a southbound train and a northbound train. He flagged the southbound train at approximately 1:30 A. M. The appellant's trainmaster then took Anderson some distance by automobile to a road crossing south of the work train. The trainmaster instructed Anderson to place torpedoes on the track and then walk north about 1500 to 2000 feet and there flag the northbound train No. 236. Anderson had such signal equipment as was needed. His lantern was lit when he started out. The torpedoes were placed and Anderson went on to the place where the train was to be flagged. There he was struck by the train which he was to flag. He was totally and permanently disabled physically, unable to speak, and incapable of any activity, physical or mental. He sued the appellant by his guardian under the Federal Employers Liability Act, 45 U. S. C. A. §51 et seq. There were three counts of the complaint, each based on different theories of liability. By the first count it was alleged that Anderson was struck by the train while he was in the process of flagging. The second count stated that he was sitting on the track when struck by the train. The third count was based upon the charge that the train was then negligently being operated at a dangerously high rate of speed. In each count it was

asserted that there was negligence in the operation of the train in failing to heed the warning of the torpedoes, in failing to heed the warning of a lantern or fusee signal, and in failing to reduce speed after being warned. The appellant denied any negligence on its part and asserted that the negligence of Anderson was the sole proximate cause of his injuries. The case was tried before court and jury. The appellant's motion for a directed verdict was denied. The jury returned a verdict for the plaintiff in the amount of $115,000. Motions for a judgment notwithstanding the verdict and for a new trial were denied. Judgment was entered on the verdict and from the judgment the appellant has appealed. While the appeal was pending Anderson died. His administratrix has been substituted as a party to the appeal.

The evidence was in conflict as to some of the occurrences after Anderson reached the place where he received his injuries. From testimony for the appellant it appeared that the train was going 40 or 41 miles per hour as it reached the torpedoes. The appellee draws an inference that the train was doing 45 or 46 miles per hour. The evidence of the appellant was that the speed of the train was reduced by about five miles an hour to approximately 35 miles an hour after hitting the torpedoes. The appellant's foreman testified that there was no lighted fusee or lantern showing. The engineer was dead at the time of the trial. For the plaintiff there was testimony of a witness who lived near the track that there was a glow at a time when he heard the train coming and the glow was from a fusee. The trainmaster, after hearing the explosion of the torpedoes, saw a red glow which he took to be Anderson's fusee. The fireman testified that he saw Anderson sitting on a rail of the track when the train was a distance of 150 to 200 feet away. He called to the engineer who applied the emergency brakes but it was impossible to stop in such a distance.

The court instructed the jury as to the rules governing negligence and as to the doctrine of contributory negli-

gence. Among the lengthy instructions was the statutory comparative negligence provision that "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U. S. C. A. §53. The court also gave an instruction on the last clear chance doctrine in which, among other things, the jury was told "If you find then that the defendant Railroad had the last clear chance of avoiding injury to James Lester Anderson, notwithstanding the prior or antecedent negligence of Mr. Anderson, he is entitled to recover damages undiminished by any degree of negligence or fault which may have been his because, in law, the one who has the last clear opportunity of avoiding injury is considered solely responsible for it." This was emphasized by the court when the jury, after retiring, returned for further instructions on last clear chance.

Our attention is first directed by the appellant to its contention that the trial court committed error in not granting its motion for a directed verdict on the ground that it did not commit any negligent act which was a contributing cause to Anderson's injury. As the Supreme Court has said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence." *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500, 524, 559, 77 S. Ct. 443, 459, 478, 1 L. Ed. 2d 493, 515 reh. den. 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764. See *Webb* v. *Illinois Central Railroad Company*, 352 U. S. 512, 521, 77 S. Ct. 451, 459,

1 L. Ed. 2d 503, 515, reh. den. 353 U. S. 943, 77 S. Ct. 809, 1 L. Ed. 2d 764; *Moore* v. *Terminal Railroad Association*, 358 U. S. 31, ..... S. Ct. ....., 3 L. Ed. 2d 24.

We do not think it can be said that there was no evidence of negligence of the appellant which might have, in some measure, played a part in producing the injuries to Anderson. The motion for a directed verdict, the motion for a judgment notwithstanding the verdict, and the motion for a new trial on the ground of absence of substantial evidence of negligence on its part were properly overruled.

The appellant asserts that there was prejudicial error in giving the jury the charge on last clear chance. The contention is made that the last clear chance doctrine is inapplicable where the comparative negligence rule has been adopted. It is said, with much logic in the saying, that the last clear chance doctrine casts upon the defendant the entire liability for damage resulting from the fault of both plaintiff and defendant; a liability which, under the comparative negligence rule, should be apportioned in accordance with the degree of fault. See Prosser, Handbook of Torts, 2d Ed. 292; 2 Harper & James, Torts, 1251-1252, N. 26; MacIntyre, Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225, James, Last Clear Chance: A Transitional Doctrine, 47 Yale L. J. 704. The retention of the last clear chance doctrine after the adoption of the comparative negligence rule has been called "absurd". 33 Can. B. Rev. 257. The Florida Supreme Court has recently held that the doctrine of last clear chance does not apply in comparative negligence cases and expressly overruled its earlier decisions holding otherwise. *Loftin* v. *Nolin*, Fla. 86 So. 2d 161, 59 A. L. R. 2d 1257. The Supreme Court of the United States has not, so far as we are aware, expressly ruled upon the applicability of the last clear chance doctrine in an F E L A case. It has considered the doctrine in such cases. See *St. Louis Southwestern Railway Co.* v. *Simpson*, 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152. Whether

generally applicable or not in comparative negligence cases, we conclude that the last clear chance doctrine has no application in this case.

After stating the last clear chance doctrine in somewhat technical terms, the Court, in its charge, continued:

> "Now, the effect of that rule means simply this: There's a lot of big words in here; I think I'd better try to bring it down a little in focus in a little more, easily understood language. It means that a plaintiff who is negligent in the first instance may recover from a negligent defendant if that negligent defendant had knowledge, or in the exercise of due care should have had knowledge, of the plaintiff's peril, and in fact had opportunity thereafter by the exercise of due care to avoid injury to the plaintiff. In other words, applying it, bringing it down to the facts in this case, if through his own negligence or inattention or for any other reason Mr. Anderson did sit on the track there where he was in a position of peril and he got there by his own fault or negligence, if in the exercise of reasonable care the defendant Railroad Company, or its agents, discovered, or could have discovered, his peril in time to have done something to have avoided injury, then the law says, 'You had the last chance; you had the last clear chance. It was within your power to avoid injuring this man and your negligence is the sole proximate cause.' So that's all that the last clear chance doctrine means. It means that the person having the last clear chance of avoiding an accident is responsible for the accident. If Mr. Anderson was asleep, or sick, or under some sort of a seizure there on the track where he was in a position of peril, and if this train crew saw him there or if by the exercise of reasonable care they should have seen him there and thereafter had time to avoid injuring him, then the Railroad Company is liable under the last clear chance doctrine."

This would render the appellant liable if it could, in the exercise of due care, have discovered the peril in time to have avoided the accident. Such is the rule in some, perhaps a majority, of jurisdictions where the plaintiff was in a position of peril from which he could not extricate himself. 2 Harper & James, Torts, 1248. But in other cases the application of the doctrine is limited to situations where the peril was actually discovered. The evidence that Anderson was not discovered until too late to avoid hitting him is not controverted. The Court of Appeals of New York adopted the view that actual knowledge of the peril was required in order to bring last clear chance into play. That court, speaking through Chief Justice Cardozo, said:

> "The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be a reasonable effort to counteract the peril and avert its consequences. Wright *v.* Union Ry. Co., 224 App. Div. 55, 229 N. Y. S. 162; id. 250 N. Y. 526, 166 N. E. 310. Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance (cf. Bragg *v.* Central New England Ry. Co., 228 N. Y. 54, 126 N. E. 253), but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge." *Woloszynowski* v. *New York Central Railroad Co.*, 254 N. Y. 206, 172 N. E. 471.

The Supreme Court of the United States, in an opinion by Mr. Justice Cardozo, approved, cited and followed, in an F E L A case, the principle which had been announced in the New York decision. In the Supreme Court opinion it was stated:

> "We do not need to inquire whether a different conclusion would follow if the conductor in the caboose had discovered that the engineer had gone

upon the main track through a misunderstanding of a later order, and discovering this, had failed after a substantial interval of time to give warning of a peril that he could have easily averted. Nothing of the kind appears. There is an absence of the essential factors that wake into life the doctrine of the last clear chance. In the first place the conductor did not know any more than Simpson did that an order had been violated. He was distrustful of his memory and was looking at the written orders at the moment of the collision. Negligent he may have been, but not recklessly indifferent to a duty to counteract a peril perceived and understood." *St. Louis Southwestern Railway Co.* v. *Simpson, supra.* See *Atchison, T. & S. F. Ry. Co.* v. *Taylor,* 8th Cir. 1912, 196 F. 878; *Iowa Cent. Ry. Co.* v. *Walker,* 8th Cir. 1913, 203 F. 685, cert. den. 231 U. S. 746, 34 S. Ct. 319, 58 L. Ed. 464.

In an F E L A case there must be a discovery of the peril before last clear chance comes into play. It is not enough that the peril might have been discovered by the exercise of reasonable care. The instruction given was erroneous and because of the error we reverse for a new trial.

The appellant urges a reversal on the ground that the verdict and judgment for $115,000 are excessive to such an extent as to require a reversal. In a memorandum the district court stated that if the jury was incorrectly permitted to consider the last clear chance doctrine it would be disposed to enter a remittitur of $35,000. Of course, and this the district court recognized, the apportionment of damages under the comparative negligence rule is for the jury subject to review if excessive as a matter of law. As there is to be a new trial it becomes unnecessary to consider further the size of the verdict.

In order that there may be a new trial the judgment of the district court is

*Reversed and Remanded.*

## Judgment.

### Extract from the Minutes of May 21, 1959.

(R. 736)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial;

It is further ordered and adjudged that the appellee, Ethel Anderson, as Administratrix of the Estate of James Lester Anderson, deceased, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

---

## District Judge's Memorandum.

### (Relating to Last Clear Chance).

(R. 711, 712)

The defendant vigorously argues the excessiveness of the verdict, asserting that "to allow a railroad employee, in violation of his continuing duty to the company and his fellow employees, who wilfully sits down upon the railroad track, apparently with no concern whatever for his own safety, and is struck by the very train which it is his duty to flag, to recover a verdict of $115,000.00 would be contrary to every American citizen's idea of right and wrong. To allow such recovery for such conduct is contrary to the natural impulses of our society to discourage conduct which has created the risk of harm". I realize that it is my duty

exclusively to determine whether or not the verdict is excessive. While the plaintiff's injuries and damages were such as to justify an even larger verdict to a plaintiff relatively free from fault, nevertheless, if the negligence on plaintiff's part and that on the part of the defendant railroad company can be apportioned, certainly the greater percentage of negligence involved was that of the plaintiff and not of the defendant railroad. The size of this verdict can be justified only if the Court was correct in instructing the jury upon the doctrine of "last clear chance", and the jury correctly applied the doctrine to the facts in this case and reached the conclusion that plaintiff's negligence was an antecedent cause, and that the negligence of the railroad company was the sole proximate cause of plaintiff's injuries.

If the jury was incorrectly permitted to consider the doctrine of "last clear chance", and if the case should have been submitted on the theory of comparative negligence alone (with "last clear chance" left out) I would be disposed to enter a remittitur requiring plaintiff to reduce the verdict to $35,000.00. I append these observations so that I may not be misunderstood as considering this verdict proper *except* upon a properly submitted theory of "last clear chance".

BRYAN SIMPSON,
United States District Judge.

Jacksonville, Fla.
December 31, 1957

## The Federal Employers' Liability Act.

**(45 U. S. Code, §51)**

**Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

*The Federal Employers' Liability Act.*

**(45 U. S. Code, Sec. 53)**

**Contributory Negligence; Diminution of Damages.**

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

**(45 U. S. Code, Sec. 54)**

**Assumption of Risks of Employment.**

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of

employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

---

**(45 U. S. Code, Sec. 56)**

**Actions; Limitations; Concurrent Jurisdiction of Courts.**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989.

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1958

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## NO. 251

---

ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, deceased,

Petitioner,

- VS -

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,

Respondent.

---

## BRIEF FOR RESPONDENT

## IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

---

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IN THE

# Supreme Court of the United States

October Term, 1958

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## NO. 251

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ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, deceased,

Petitioner,

- VS -

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,

Respondent.

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## BRIEF FOR RESPONDENT

---

## IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

---

### STATEMENT OF THE CASE

The Petitioner was Appellee and Respondent was Appellant in the Court of Appeals. Respondent, in the interest of brevity, will use the symbol "R" when referring to the Record-on-Appeal, the symbol "A" when referring to Petitioner's Appendix, and the symbol "B" when referring to Petitioner's Brief. Since the filing of Petitioner's brief the opinion of the Court below has been recorded in 267 F. 2d at page 329.

## STATEMENT OF THE FACTS

The Petitioner's "The Facts of the Injury" is based largely upon argument and inferences which a jury could have drawn rather than actual testimony and is, to that extent, misleading. For instance, on page four of Petitioner's Brief it is stated Anderson put down a burning fusee, citing pages 144-145 of the Record. A reading of the testimony shows the witness attempted to explain that what he had first assumed was a burning fusee was actually a reflection from the red Mars light on Train No. 236 when it was put into emergency (R. 2[illegible]). There was direct testimony by all of the eyewitnesses that Anderson did not light a fusee and flag No. 236 prior to the accident (R. 43, 456, 492). No useful purpose can be served in attempting to state what the facts were and what the facts were not as the pertinent facts are clearly and concisely stated by the Court of Appeals in its opinion (R. 726-727; A. 11-12). Respondent respectfully submits that the question presented should be considered in the light of the facts as found by the Court of Appeals rather than Petitioner's Argumentative and misleading statement.

## QUESTION PRESENTED

The Petitioner has unduly restricted and narrowed the points presented in the Court of Appeals and to this Court. The Court of Appeals based its opinion upon the premise that under the facts presented the "Doctrine of Last Clear Chance" was inapplicable. Appellant in that Court, Respondent here, also relied upon and argued the point that the Last Clear Chance Doctrine has no place in an action under the Federal Employers Liability Act because that statute has substituted the comparative negligence doctrine and therefore the reason for

the application of the last clear chance principle in common law actions no longer exists (R. 729-730; A. 14-15).

## ARGUMENT

REASONS FOR DENYING CERTIORARI:

(1) The Petition for Certiorari is without merit.

(2) The Doctrine of Last Clear Chance is not applicable to actions under the Federal Employers Liability Act.

(3) The Doctrine of Last Clear Chance was not applicable under the evidence.

### (1) THE PETITION FOR CERTIORARI IS WITHOUT MERIT:

In citing *Rogers vs. Missouri-Pacific RR. Co.*, 325 U.S. 500, 509; 77 S. Ct. 443, 1 L. Ed. 2d 493; *Arnold vs. Panhandle & San Francisco RR. Co.*, 353 U.S. 360, 77 S. Ct. 1375, 1 L. Ed. 2d 889; *Ringhiser vs. Chesapeake & Ohio RR. Co.*, 354 U. S. 901, 77 S. Ct. 1093; 1 L. Ed. 2d 1268; *Brown vs. Western RR. of Ala.*, 338 U.S. 294, 94 L. Ed. 100; *Wilkerson vs. McCarthy*, 336 U. S. 53, 93 L. Ed. 497; *Owens vs. Union-Pacific RR. Co.*, 319 U. S. 715, 87 L. Ed. 1683; *Coray vs. So. Pacific Co.*, 335 U.S. 520, 93 L. Ed. 208; *Fairport P. & E. R. Co. vs Meredith*, 292 U.S. 589, 598; 78 L. Ed. 1446 and *Urie vs. Thompson*, 337 U.S. 163, 93 L. Ed. 1282, 1297, the Petitioner contends the opinion of the Court of Appeals is in conflict with these decisions of this Court, thereby calling for the discretionary jurisdiction of this Court under the Supreme Court Rule 19(b) because Petitioner has been deprived of the "fruits of a jury verdict". Analyzing these cases it appears for the most part

that they were reviewed by this Court upon the sufficiency of the evidence of negligence to maintain an action under the Federal Employers Liability Act. Not one decision in the above cases cited by the Petitioner conflicts with the view of the Court of Appeals that the Doctrine of Last Clear Chance does not apply in the case at bar. On the contrary, the Court of Appeals gave effect to the decisions of this Court in *Rogers vs. Missouri-Pacific RR. Co.*, supra, and others, by holding that Respondent's Motion for Directed Verdict and for the entry of a judgment non obstante veredicto were properly overruled (R. 729; A. 14). It clearly appears that the opinion of the Court of Appeals is not in conflict with the cases cited but is, in fact, in accord with this Court's interpretation of the Federal Employers Liability Act.

The opinion of the Court of Appeals is in harmony with the cited decisions and not in conflict therewith, leaving nothing for this Court to review other than the action of the Court of Appeals in holding that the Doctrine of Last Clear Chance was not applicable under the evidence of the case at bar. It is therefore submitted that no sufficient, substantial question has been raised within the meaning of Supreme Court Rule 19(b). The Petitioner has been deprived of nothing to which he is entitled under the Federal Employers Liability Act. The Court of Appeals has expressly decreed a trial by jury on the issue of negligence and the Petition for Certiorari merely seeks to have this Court review the evidence and perhaps second guess the Court of Appeals as to the applicability of the Docetrine of Last Clear Chance under the evidence.

## (2) THE DOCTRINE OF LAST CLEAR CHANCE IS NOT APPLICABLE TO ACTIONS UNDER THE FEDERAL EMPLOYERS LIABILITY ACT.

Last Clear Chance had its origin in the old English case

of *Davies vs. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588, decided in 1842. This doctrine was devised to prevent miscarriage of justice by the harsh rule that one, who by his own negligence contributed to his own hurt, could not under any circumstances recover.

The law is otherwise where the doctrine of comparative negligence has been substituted for the rule that contributory negligence is a bar to recovery. The modern legal writers and the better reasoned decisions furnish impressive authority for the conclusion that reason and legal justification for last clear chance as an exception to the contributory negligence rule ceases to exist in jurisdictions applying the comparative negligence rule. Retaining this doctrine has been called "absurd." 33 Can. B. Rev. 257. See Prosser, *Handbook of Torts*, 2d Ed. 292; 2 Harper & James, *Torts*, 1251-1252, N. 26; MacIntyre, *Rationale of Last Clear Chance*, 53 Harv. L. Rev. 1225; James, *Last Clear Chance: A Transitional Doctrine*, 47 Yale L. J. 704.

In *Smith vs. American Oil Co.*, 77 Ga. App. 463, 49 S.E. 2d 90, the Georgia court, in refusing to apply last clear chance in a comparative negligence situation, stated at page 490:

> "It will thus be seen that the doctrine of contributory negligence under the common law and that doctrine as modified by the rule of last clear chance under the common law, have no place in our rules of comparative negligence and apportionment of damages under our code sections as such. Such doctrine or rule of contributory negligence and the rule of last clear chance are involved in and vanish as such into our principle of comparative negligence and apportionment of damages."

The Supreme Court of Florida has recently held that the Doctrine of Last Clear Chance does not apply in comparative negligence cases and has expressly overruled its earlier decisions holding otherwise. *Loftin vs. Nolan, Fla.*, 86 So. 2d 161, 59 A.L.R. 2d 1257.

The Congress of the United States in specifically enacting the comparative negligence doctrine as a part of the Federal Employers Liability Act did not leave to discretion and make dependent thereon the rights of railroad workers to recover upon the niceties of the common law rule of contributory negligence and its exception, the Doctrine of Last Clear Chance.

Title 45, U.S.C.A., Sec. 53, specifically states:

> "... the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be dimished by the jury in proportion to the amount of negligence attributable to such employee ..."

Mr. Justice Douglas in *Bailey vs. Central Vermont RR. Co.*, 319 U.S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062, has aptly pointed out that the Federal Employers Liability Act creates Federal rights largely fashioned from the common law *except as Congress has written different standards into the Act*. Among those different standards is the substitution of the comparative negligence principle and apportionment of damages in accordance with the relative fault of the parties. The basis for recovery, clearly spelled out in the Act, may be stated as follows: If only the employer was negligent, full recovery; if only the employee was negligent, no recovery; but if both employer and employee are negligent, apportion-

ment of damages. By giving the charge of last clear chance the Court superimposed another element of liability; i.e., that if both employer and employee are negligent but in the eyes of the jury the employer could have avoided the injury notwithstanding the contributory negligence of the employee, the apportionment principle applicable under the statute may be disregarded and the full amount of damages awarded to the employee.

Likewise, Mr. Justice Brennan, in discussing the views of the Supreme Court of Missouri on proximate cause in *Rogers vs. Missouri-Pacific RR. Co.*, supra, stated at pages 509-510:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases."

Under the common law the Doctrine of Last Clear Chance was just as available to the negligent defendant as it was to a negligent plaintiff in a proper situation. *Friedman vs. Morris*, 4 Cir., 1954, 209 F. 2d 886. Certainly no one would seriously contend that a negligent railroad could use the Doctrine of Last Clear Chance to escape liability under the Federal Employers Liability Act, since the Act itself provides otherwise. It is equally obvious that if the Doctrine of Last Clear Chance is not available to permit a negligent railroad to escape liability under the Act it cannot be used by a negligent employee to escape diminution of damages for his negligence under the Act. The codification of the doctrine of comparative negligence into the Federal Employers Liability Act

effectively remove the necessity for the last clear chance doctrine in Federal Employers Liability Act cases and the District Court was in error in charging the jury thereon.

We have been able to find no cases in which the Supreme Court of the United States has held that the last clear chance doctrine is applicable under the Act. The doctrine is referred to in *St. Louis-Southwestern Ry. Co. vs. Simpson, Adm.*, 286 U.S. 46, 76 L. Ed. 1152, but the Court in that case held that it was inapplicable under the facts because the negligence of the engineer in disobeying a train order was a continuing one and that there was no opportunity on the part of the conductor, in view of the shortness of time, to avoid the collision in which the engineer met his death.

(3). THE DOCTRINE OF LAST CLEAR CHANCE WAS NOT APPLICABLE UNDER THE EVIDENCE.

It is crystal clear from the testimony that Flagman Anderson was negligent. The District Court stated (A. 19):

> "... if the negligence on the plaintiff's part and that on the part of the defendant railroad company can be apportioned, certainly the greater percentage of the negligence involved was that of the plaintiff and not of the defendant railroad."

Flagman Anderson disregarded every cardinal rule of safety in sitting on the track upon which he knew Train No. 236 would shortly pass. He violated his mandatory duty to flag Train No. 236 (R. 43) and his duty to protect his own train, No. 225. *Great Northern Ry. Co. vs. Wiles, Adm.*, 240 U.S. 444. He failed to exercise any care or precaution for his own safety. His negligence was continuing, *St Louis & Southwestern Ry.*

*Co. vs Simpson*, supra, and concurrent, *Kan. City Sou. Ry. Co. vs. Ellzey*, 275 U.S. 236, 72 L. Ed. 259, 485 S. Ct. 80. This court there held that where several acts of negligence are so closely welded together in time as well as in quality they could not be viewed as independent acts, last clear chance was not applicable. See also *Sou. Ry. Co. vs. Melton*, 198 So. 588; *Ward vs. City Fuel Oil Co.*, 147 Fla. 320, 2 So. 2d 586; *Davis vs. Cuesta*, 146 Fla. 471, 1 So. 2d 475.

In *Sou. Ry. Co. vs. Melton*, supra, an action under the Federal Employers Liability Act for injuries to a signal maintainer in a collision between a train and his automobile, the Alabama Supreme Court in holding last clear chance not applicable stated at page 594:

> "In the instant case, decedent if on duty as contended, was under a specific burden to watch out for and avoid trains operated in the usual way.' *Chesapeake & Ohio Ry. Co. vs Nixon*, 271 U.S. 218, 46 S. Ct. 495, 70 L. Ed. 914. This was a continuing duty up to the very time of the impact, and whether he had actual knowledge of his imminent danger or the alleged negligence of the engineer or not. This duty was not conditioned on such knowledge and was concurrent with and even subsequent to the engineer's negligence if possible. His duty was so welded with everything which immediately transpired then and there in terms of a few seconds as to make them all parts of an unified act in which the doctrine of last clear chance does not apply under the authority of *St. Louis and Southwest Railway Co. vs. Simpson*, supra."

There was no evidence that the Plaintiff was in a position of peril from which he could not extricate himself. The testi-

mony is uncontradicted that all of the eyewitnesses on Train No. 236 were looking for Flagman Anderson from the time the torpedoes were struck until he was discovered sitting on the rail (R. 53-54) and the fact that Flagman Anderson was not discovered until too late to avoid hitting him is uncontroverted (R. 16). There is no probability that a reasonably careful person under similar circumstances could have done any more than was done. See *Sou. Ry. Co. vs Gray*, 241 U.S. 333, in which this court has held that there was no duty on the part of the engineer to expect a brakeman to be asleep on the railroad; *DeBaur vs. LeHigh Valley RR. Co.*, 269 Fed. 964; *Pa. RR. Co. vs. Swartzel*, 2 Cir., 17 F. 2d 869; *Deere vs. Sou. Pacific RR. Co.*, 9 Cir., 123 F. 2d 438.

Petitioner has cited several decisions from other Federal circuits involving particular treatment of the Doctrine of Last Clear Chance (Br. 8-9). Most of these decisions arise from pedestrian and automobile collisions which were tried in District Courts where the substantive law of the particular state controlled the application of the Doctrine of Last Clear Chance. If it is Petitioner's contention that the substantive state law should govern, the case at bar would be controlled by the law of Florida which expressly hold that last clear chance is not applicable in comparative negligence cases. *Loftin vs. Nolan*, supra, It further appears from the cases cited by Petitioner that none of these decisions involve the Federal Employers Liability Act and the rule of contributory negligence applied. It is respectfully submitted that none of these decisions are authority on the question before this Court and the opinion of the Court of Appeals that last clear chance had no application to the case at bar is correct.

## CONCLUSION

It is respectfully submitted that upon a careful consideration of the Petition for Certiorari, the briefs and the Record, it will be found that the opinion of the Court of Appeals, in holding: (1) that the Doctrine of Last Clear Chance was not applicable under the evidence, and (2) that the issues of negligence were proper for the jury under correct instructions of law, is in accord with the applicable decisions of this Court. Respondent further submits that no substantial question has been presented to justify a review of the action of the Court of Appeals and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel for Respondent

## CERTIFICATE OF SERVICE

I, CLARK W. TOOLE, JR., one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of August, 1959, I served a full, true and correct copy of the foregoing Brief for Respondent, on ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased, Petitioner herein, by mailing such a copy in a duly addressed envelope with first class postage prepaid to her attorneys of record, addressed as follows:

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604 Lynch Building
Jacksonville 2, Florida

WILLIAM MIZELL HOWELL, ESQ.
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705 Lynch Building
Jacksonville 2, Florida

and duly deposited the same in the United States Post Office at Jacksonville, Florida, on the said date.

CLARK W. TOOLE, JR.

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FILED
SEP 8 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959.

**No. 251.**

ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased,

*Petitioner,*

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY,

*Respondent.*

## PETITIONER'S REPLY BRIEF.

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IN THE

# Supreme Court of the United States

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ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased,

Petitioner,

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

## PETITIONER'S REPLY BRIEF.

It may not be amiss to say one or two things about respondent's brief even though they are so obvious.

1. The statement at the top of respondent's page 2 that

> "The Petitioner's 'The Facts of the Injury' is based largely upon argument and inferences *which a jury could have drawn* rather than actual testimony and is, to that extent misleading". (Emphasis ours.)

is inconsistent within itself, and suggests its own answer: if the inferences could have been drawn by a jury, the facts for their basis could not be misleading, and the jury only, not the Court of Appeals as respondent suggests on that

page 2, was authorized to draw them. *Lavender v. Kurn*, 327 U. S. 645, 653, 90 L. Ed. 916, 922.

2. At its page 4 respondent states that this Court is being requested by petitioner to review "the action of the Court of Appeals in holding that the doctrine of last clear chance was not applicable under the evidence . . .". We truly hope that our petition is not as obscure as counsel's understanding of it. As we read the opinion of the Court of Appeals, it made no holding that the doctrine is not applicable. It toyed with the idea and then passed it by without making any decision about it. What the Court did hold is as submitted on page 3 of our petition, and all that it held was (R. 734):

> "In an *Fela* case there must be a discovery of the peril before last clear chance comes into play. It is not enough that the peril might have been discovered by the exercise of reasonable care. The instruction given was erroneous and *because of the error* we reverse for a new trial". (Italics added.)

All in all the Court of Appeals has made a choice least advantageous to the petitioner. In doing so the Court of Appeals has not taken to heart the teaching of *Jesionowski v. Boston & Maine Railroad*, 329 U. S. 452, 457, 91 L. Ed. 416, 421, that the real question in these railroad employee cases "is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding" by the jury in the employee's favor.

Accordingly we ask leave to renew our submission that a jury having made the award and the Court of Appeals agreeing that the case was for the jury, and declining to

reduce the amount of the verdict, this Court not permit that court to thwart the verdict by the oblique method adopted.

Respectfully submitted,

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Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 251.

ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased,

*Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

*Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

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Respondent.

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## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner prays that this Court grant a rehearing of its order of October 12, 1959 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed July 29, 1959 herein.

### Reasons for Granting Rehearing and Issuing the Writ.

1. Petitioner requested the Court to review the non-final judgment of the Court of Appeals, in the belief that *Affolder* v. *New York C. & St. L. R. Co.*, 339 US 96, 94 L. Ed. 683 authorized the request. *Affolder,* suing under the Federal Employers' Liability Act, obtained a verdict in the District Court for the Eastern District of Missouri. On a motion

for new trial the District Judge held that he had not erroneously charged the jury. 79 F. Supp. 365. The Court of Appeals for the Eighth Circuit disagreed and reversed for the sole reason that the charges were erroneous. The opinion concludes (174 F. 2d 486, 493):

> "Because of the error in the charge heretofore noted, the judgment is set aside and the cause is remanded for a new trial."

Corresponding language in the opinion of the Fifth Circuit Court of Appeals is (R. 734):

> "The instruction given was erroneous and because of the error we reverse for a new trial."

This Court granted Affolder's petition for certiorari (338 US 813), considered the case on the merits presented by the petition, reversed the Court of Appeals and affirmed the judgment of the District Court (339 US 101). There were two dissents. They were not with respect to the fact that the judgment of the Court of Appeals did not finally dispose of the case, but on account of the view of one Justice that the writ had been improvidently granted because "the case does not fall within the proper business of the Court", and because one Justice dissented on the merits. The briefs of counsel, 94 L. Ed. 685, 686, apparently did not, as here they do not, notice the non-finality of the judgment.

2. Now is the only time that petitioner can present to this Court the action of the Court of Appeals which has rendered worthless the verdict rendered in favor of the now deceased employee. At the time he died the judgment upon the verdict was an asset of his estate. No later judgment against respondent will be so. If the case is tried again in the District Court the plaintiff will be the decedent's personal representative and her measure of damages will be significantly different. It is at least speculative that the

personal representative would undertake to submit to this Court after a final judgment in the Court of Appeals the point upon which our petition for certiorari is based—but irrespective of that, if the view of the Court of Appeals is wrong, unless it be corrected now that Court's opinion will stand for an indeterminate period of time to the discomfiture of litigants under the Federal Employers' Liability Act and as the only decision of its sort.

Because of these considerations we ask leave to invoke the Court's discretion which it exercised in *Brady* v. *Terminal RR Assn.*, 302 US 678, 688, 303 US 10, 82 L. Ed. 523, 531, 614; *American Construction Co.* v. *Jacksonville T&KW R. Co.*, 148 US 372, 387, 37 L. Ed. 486, 492; *Bakery & Pastry Drivers* v. *Wohl*, 315 US 769, 773, 86 L. Ed. at page 1183; *Cafeteria Employees Union* v. *Angelos*, 319 US 753, 778, 87 L. Ed. 1707, 1724, 320 US 293, 88 L. Ed. 58, in each of which the Court on rehearing granted certiorari, which originally it had denied because of an apparent jurisdictional defect which the petition for rehearing showed to be apparent only and not actual. Exercise of the discretion here will not involve an evaluation of the facts but a ruling as to whether in an employee's case under the Federal Employers' Liability Act a rule of law so strict as to be unique will be so applied as to overturn a jury verdict. The case seems to be like one of those referred to in one of the dissenting opinions in *Rogers* v. *Missouri P. R. Co.*, 352 US 500, 532, 1 L. Ed. 2d 493, 524, 77 S. Ct. 443, as "raising questions that are not evidentiary, questions that fairly involve the construction or scope of the statute", which class of cases, it is then added, "are appropriate for review here".

## Conclusion.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Counsel for Petitioner.

## Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; that it is confined to grounds not previously presented; and that it is restricted to grounds specified in Rule 58 of the Rules of this Court.

WILLIAM MIZELLE HOWELL,
Counsel for Petitioner.

---

## Certificate of Service.

I hereby certify that I served this document this 28th day of October, 1959, by depositing two copies of it in a United States mail box with first class postage prepaid, addressed to Louis Kurz, Esquire and Clark W. Toole, Jr., Esquire, counsel of record, at their post office address.

WILLIAM MIZELLE HOWELL,
Counsel for Petitioner.